No. 86-791

In The

Supreme Court of the United States

October Term, 1986

DAVID ASHBURN GREY
Petitioner,

vs.

THE STATE BAR OF CALIFORNIA
Respondent,

Petition for Writ of Certiorari
to the Supreme Court of California

RESPONDENT'S BRIEF IN OPPOSITION

HERBERT M. ROSENTHAL
TRUITT A. RICHEY, JR.*
GERALD R. MARKLE
ERICA TABACHNICK
Attorneys at Law
555 Franklin Street
San Francisco, California 94102
(415) 561-8200
Attorneys for Respondent
*Counsel of Record

QUESTIONS PRESENTED

1. May a lawyer be subjected to professional discipline (a public reproval) for broadcasting an advertisement soliciting professional employment which is inherently misleading in that a client of the lawyer gave a testimonial about and endorsement of the attorney by telling of a substantial recovery the attorney obtained for the client (who was involved in a traffic accident on a freeway) but omitting relevant facts which would have disclosed that a great portion of that recovery was based on an unusual cause of action and special facts (a bad faith claim against an insurance company) not available to most claimants?

2. May discipline be imposed pursuant to a Rule of Professional Conduct that forbids lawyer advertising that tends to confuse and mislead the public and requires the inclusion in advertising

of statements that are intended to reduce or eliminate the likelihood that recipients of the advertising will be misled?

3. May discipline be imposed for an advertisement that on its face is inherently confusing and misleading to the public but which with a few additional words of explanation and caveat could have been corrected so that it did not confuse or mislead?

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TABLE OF AUTHORITIES
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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, The State Bar of California, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the California Supreme Court determination in David Ashburn Grey v. The State Bar of California (Cal. S.Ct. Docket

No. L.A. 32152)* The California Supreme Court denied petitioner's Petition for Writ of Review by order dated July 15, 1986.

I

THE RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA

The Rules of Professional Conduct of The State Bar of California are adopted by the Board of Governors of The State Bar of California. When approved by the

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* The Petition for Writ of Certiorari is directed to "The State Bar Court of California." The State Bar Court is not a court of record. It is a quasi-judicial arm of The State Bar of California, established by the State Bar to hear lawyer discipline matters and make recommendations as to suspension or disbarment to the California Supreme Court. Cal. Bus. & Prof. Code, §§ 6077, 6078, 6081 and 6086.5. The State Bar may impose public or private reprovals on members of the State Bar without recommendation to the Supreme Court (Bus. & Prof. Code, §§ 6077, 6078), but the members may seek review of that action in the California Supreme Court which may or may not grant review. Once review is sought, whether or not it is granted, the final disciplinary decision becomes that of the Supreme Court of California. See Konigsberg v. The State Bar of California, 353 U.S. 252, 254, 77 S.Ct. 722, 724 (1957).

Supreme Court of California they are binding upon all members of The State Bar of California and for their violation the State Bar may administer a public or private reproval to the member or recommend to the Supreme Court that he or she be suspended from the practice of law for a period not exceeding three years. Cal. Bus. & Prof. Code, §§ 6077, 6078.

At issue in this proceeding is rule 2-101 of the Rules of Professional Conduct. Rule 2-101 was approved by the Supreme Court of California effective April 1, 1979 subsequent and partially in response to this Court's decision in Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2671 (1977)*

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* The study leading to the revision of the California Lawyer Advertising Rules began and continued for some years before the Bates decision.

Rule 2-101, as relevant here, reads as follows:

> RULE 2-101. PROFESSIONAL EMPLOYMENT.
>
> This rule is adopted to foster and encourage the free flow of truthful and responsible information to assist the public in recognizing legal problems and in making informed choices of legal counsel.
>
> Accordingly, a member of the State Bar may seek professional employment from a former, present or potential cient by any means consistent with these rules.
>
> (A) A "communication" is a message concerning the availability for professional employment of a member or a member's firm. A "communication" made by or on behalf of a member shall not:
>
> (1) Contain any untrue statements; or
>
> (2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive or mislead the public; or
>
> (3) Omit to state any fact necessary to make the statements made, in the light of the circumstances under

which they are made, not misleading to the public; or

(4) Fail to indicate clearly, expressly or by context, that it is a "communication"; or

(5) State that a member is a certified specialist unless the member holds a current certificate as a specialist issued by the California Board of Legal Specialization pursuant to a plan for specialization approved by the Supreme Court; or

(6) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats or vexatious or harassing conduct.

* * *

(D) The Board of Governors of the State Bar shall formulate and adopt standards as to what "communications" will be presumed to violate subdivisions (A) or (B) of this rule 2-101. The standards shall have effect exclusively in disciplinary proceedings involving alleged violations of these rules as presumptions affecting the burden of proof. "Presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. The

standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on members of the State Bar.

Pursuant to rule 2-101(D) the Board of Governors of the State Bar has adopted the following standards effective May 25, 1979:

(1) A "communication" which contains guarantees, warranties or predictions regarding the result of legal action is presumed to violate rule 2-101, Rules of Professional Conduct.

(2) A "communication" which contains testimonials about or endorsements of a member is presumed to violate rule 2-101, Rules of Professional Conduct.

(3) A "communication" which is delivered in person or by telephone to a potential client who is in such a physical, emotional or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel, is presumed to violate rule 2-101, Rules of Professional Conduct.

(4) A "communication" which is transmitted at the scene of an accident or at or en

> route to a hospital, emergency care center or other health care facility is presumed to violate rule 2-101, Rules of Professional Conduct.

II

STATEMENT OF THE FACTS

The essential facts were stipulated.

1. Petitioner, David A. Grey, was admitted to the practice of law in the State of California on December 18, 1975.

2. In or about 1981, petitioner engaged in a radio advertising program concerning his availability for professional employment.

3. One such radio "spot" consisted of a former client of petitioner, Sharon S., giving the following message:

> "I was rear ended on the San Diego Freeway and my medical bills were piling up and the insurance company was giving me a hard time, constantly harrassed me, just all in all gave me a bad time. I contracted [sic] an attorney friend that I knew. He told me that he usually does not take cases that might go to

> trial. And he recommended me to Grey & Oring.* They immediately took the case and we finally ended up in court. I got a nice award of money and all of a sudden I got a phone call from Grey & Oring. They hadn't liked the way the insurance compay had treated me and they wanted to take them to trial and suddenly the insurance compay offered me a settlement of double the amount of the original trial. If I had any legal problem, car accident or anything, I'd definitely go back to Grey & Oring. I certainly do believe that."

Said message was followed by an announcer adding:

> "Grey & Oring. That's G-R-E-Y and Oring, a private law firm. If you have an automobile accident, you need a lawyer. Grey & Oring, 558-8000. There's no charge for consultation. 558-8000."

4. The statements of Sharon S. were extemporaneous and were true and reflected her actual experience as a client of Grey & Oring. Her statements were not discussed

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* Mark Oring is not a party to the present petition. He and the State Bar stipulated that he would be subject to the same ultimate discipline, if any, imposed on petitioner Grey.

with either Mr. Grey or Mr. Oring and neither they nor any lawyer from their office was present at the time the radio spot was recorded.

5. At the time he engaged in said radio advertising program, petitioner was aware of rule 2-101 and, in particular, of presumption (2), adopted pursuant to rule 2-101(D) of the Rules of Professional Conduct, which states as follows: "(2) A 'communication' which contains testimonials about or endorsements of a member is presumed to violate rule 2-101, Rules of Professional Conduct."

A Hearing Panel* of the State Bar Court, after reviewing the stipulated

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* In California the State Bar Court consists of numerous hearing panels which take evidence, make findings of fact and, if appropriate, recommendations of discipline. There is one Review Department which reviews Hearing Panel decisions and either adopts or (after giving the parties

(footnote continued on next page)

facts and hearing argument concluded thee was no culpability shown because rule 2-101(D) and Standard (2) were unconstitutional. The Review Department found the rule and standard constitutional and imposed a public reproval. Neither the Hearing Panel nor the Review Department made a finding as to whether the advertisement was or was not inherently misleading or in fact actually misled anyone.

(footnote continued from preceding page)

an opportunity to be heard) modifies the Hearing Panel decision. The ultimate decision or recommendation of the State Bar is made by the Review Department. Cal. Bus. & Prof. Code, § 6086; Rules of Procedure of The State Bar of California printed in Cal. Civ. & Crim. Court Rules, vol. 23, part 2, pp. 290-323 (West 1986).

III

ARGUMENT

THE DECISION BELOW WAS DECIDED IN A WAY CONSISTENT WITH THE APPLICABLE DECISIONS OF THIS COURT.

Rule 2-101(A) is on its face constitutional. The restraints it places on lawyer advertising are, we submit, as limited as any rule now existing, or proposed, in the United States. In essence rule 2-101(A) prohibits lawyer advertising that contains untrue statements (rule 2-101(A)(1)), that uses a manner or format which is false or deceptive or which tends to confuse, deceive or mislead the public (rule 2-101(A)(2)), that omits to state any fact necessary to make the statements it contains not misleading to the public (rule 2-101(A)(3)), that fails to state it is a "communication" (i.e., an advertising message) (rule 2-101(A)(4)), that makes false statements regarding the

member's status as a certified specialist (rule 2-101(A)(5)) or that is transmitted in a manner that is intrusive or coercive, etc. (rule 2-101(A)(6)).

There is no contention that petitioner's radio advertisement violated subdivisions (4), (5) or (6). The parties stipulated and the Review Department found that the statements made by Sharon S. in the advertisement were true and reflected her own actual experience.

However, the State Bar submits that inthis case the advertisement in question on its face violated subdivision (2) and subdivision (3) of rule 2-101(A) and this is so, whether the rebuttable presumption of rule 2-101(D) is applied or not.

In the advertisement broadcast by petitioner, Sharon S. stated:

> ". . . I got a nice award of money and all of a sudden, I got a phone call from Grey & Oring. They hadn't liked the way the insurance

> company had treated me and they wanted to take them to trial and suddenly the insurance company offered me double the amount of the original trial. . . ."

Simply because this was the result of Sharon S.'s case, it does not follow that the advertised result would be available to the average consumer of legal services. Sharon S.'s case was unique and that uniqueness was the set of underlying facts which gave rise to bad faith cause of action against the defendant's insurance company. This set of facts is seldom, if ever, present in most accident cases and the cause of action that Sharon S. had (and the resulting "double" recovery) are just not available to most prospective litigants. This was not explained--or even hinted at--in the broadcast advertisement. We submit, it is clear from the face of the advertisement that it inherently tended to confuse and mislead the public that heard that

broadcast (in violation of rule 2-101(A)(2). Also, with the addition of a few words of appropriate disclaimer and factual explanation, the natural misconceptions inherent from the advertisement could have been avoided. Thus rule 2-101(A)(3) would not have been violated.

Under the law of this land, misleading advertisements may be restrained. See Virginia State Board of Pharmacy v. Virginia Consumers Council, 425 U.S. 748, 96 S.Ct. 1817 (1976); Bates v. State Bar of Arizona , 433 U.S. 350, 97 S.Ct. 2671 (1977); In re Primus, 436 U.S. 417, 98 S.Ct. 1893 (1978); In re RMJ, 455 U.S. 191, 102 S.Ct. 929 (1981); Zauderer v. Office of Disciplinary Counsel, ___ U.S. _____, 105 S.Ct. 2265 (1985).

As to the validity of restricting misleading commercial speech, in fields other than the legal profession, see

Friedman v. Rogers, 440 U.S. 1, 99 S.Ct. 887 (1979); Central Hudson Gas v. Public Service Commission of New York, 447 U.S. 557, 100 S.Ct. 2343 (1980).

This Court has emphasized that attorneys who question the regulation of advertising are required to show that their particular advertisements are constitutionally protected speech.

In answer to the contention that an overbroad regulation of lawyer advertising might serve to chill protected speech, the Court stated:

> But the justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context. As was acknowledged in Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. at 771 n.24, 96 S.Ct. at 1830, there are "common sense differences" between commercial speech and other varieties. See also id. at 775-781, 96 S.Ct. at 1832-1835 (Concurring Opinion). Since advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being

> crushed by overbroad regulation. See id. at 771-772 n.24, 96 S.Ct. at 1830-1831. Moreover, concerns for uncertainty in determining the scope of protection are reduced; the advertiser seeks to disseminate information about a product or service that he provides, and presumably he can determine more readiy than others whether his speech is truthful and protected. Ibid. Since overbreadth has been described by this court as "strong medicine," which "has been employed . . . sparingly and only as a last resort," (citation omitted) we decline to apply it to professional advertising, a context where it is not necessary to further its intended objective. (Emp. added.) (433 U.S. at 380-381, 97 S.Ct. at 2707-2708.)

Thus, in the context of commercial speech, the overbreadth doctrine is unavailable to attorneys challenging the validity of regulations on such speech. Petitioner must challenge the regulation as it applies to his conduct.

This is not a case where the meaning of the advertisement is clear and concise; it does confuse and mislead. Nor it is a case where the person

responsible for the content of the advertisement (i.e., petitioner, not his ad agency or Sharon S.) has undertaken by the use of simple explanations or caveats to make clear the actual meaning of Sharon S.'s statement and how unique her particular recovery was. The constitutional arguments against a complete prohibition of lawyer testimonial advertising in those situations (whatever merit those arguments might have) are just not available here.

Further, neither rule 2-101(A) nor Standard 2 prohibit testimonial advertising by lawyers. A lawyer is free to advertise with testimonials if such advertisements are honest statements by the endorser and do not confuse or mislead the public. Further, a lawyer can place in a testimonial ad words of explanation or caveat to reduce or eliminate the chances of confusing or

misleading the public. In any disciplinary procedures, the lawyer is only required to show that the ad is not inherently misleading and that he has taken adequate steps to insure that.

The four Standards adopted by the California Board of Governors pursuant to rule 2-101(D) are specific and narrowly drawn. The reason behind Standard 2 was explained in the Committee Report to the Board

> Testimonials "are inherently deceptive and misleading because past performance of an attorney is no indication of future performance, and because no lawyer can guarantee the results of any legal action.
>
> Advertising of acquittals or large verdicts may lead the public to believe that the likelihood of obtaining a similar result is high if the services of this particular attorney are obtained, and ignores the importance of facts, applicable law, and an attorney's selective choice of clients in determining the outcome of a case."

Lawyer advertisement is a new fact of life and has been since this Court's 1977 decision in Bates. California has recognized this and proceeded apace with the formulation and adoption of a rule that would permit the widest range of lawyer advertising possible consistent with the legitimate state interest of public protection by preventing false advertising, misleading advertising, confusing advertising and deceptive advertising. Rule 2-101 is that rule and Standard 2 adopted pursuant to that rule is recognition that in lawyer advertising, testimonials and endorsements are likely to be inherently misleading, It puts on the advertiser (in this case, petitioner) the burden of either insuring that they are not confusing or misleading or explaining why they are not. That is not an excessive burden for an advertiser to assume.

The State Bar Court Review Department concluded that Standard 2 as applied to petitioner was constitutional. This conclusion was upheld by the Supreme Court of California. The ad in question was inherently confusing and misleading; the defects could have easiy been remedied by providing more information in the ad. Petitioner failed to do this and he provided no explanation.

IV

CONCLUSION

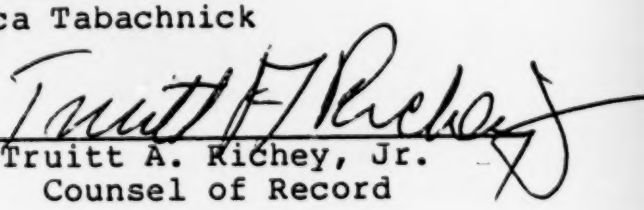
The decision below was decided in accord with constitutional principles established by this Court.

The petition for the Writ of Certiorari should be denied.

Dated: December 16, 1986

Respectfully submitted,

Herbert M. Rosenthal
Truitt A. Richey, Jr.
Gerald R. Markle
Erica Tabachnick

By 
Truitt A. Richey, Jr.
Counsel of Record

Attorneys for
The State Bar of California

DECLARATION OF SERVICE BY MAIL

I, Chiyeko Kimura, declare as follows:

I am a citizen of the United States and a resident of the County of San Francisco. I am over the age of eighteen years and not a party to the within entitled action. My business address is 555 Franklin Street, San Francisco, California 94102. On December 16, 1986, I served the within

RESPONDENT'S BRIEF IN OPPOSITION

on the interested parties by placing a true copy thereof enclosed in a sealed envelope with first-class postage thereon fully prepaid in the United States mail at San Francisco, California, addressed as follows:

Stanley Fleishman
A Professional Corporation
2049 Century Park East
Suite 3160
Los Angeles, California 90067

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration is executed this 16th day of December, 1986 at San Francisco, California.

Chiyeko Kimura